IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 574

ALEX MAZY,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN ILLINOIS STATE PENITENTIARY, STATESVILLE, ILLINOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

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PETITION AND BRIEF.

To the Honorable Judges of the Supreme Court of the United States:

Your Petitioner, Alex Mazy, respectfully shows unto the Court as follows:

That he is a citizen of the United States of America.

That on May 11, 1945, pursuant to his Habeas Corpus Petition and the return thereto, he was discharged by the District Court of the United States for the Northern District of Illinois, Eastern Division, from the custody of the respondent, Joseph E. Ragen, Warden of the State Penitentiary of Illinois at Statesville.

A certificate of probable cause was thereafter signed by one of the judges of the Circuit Court of Appeals and an appeal perfected by the said Warden to the Circuit Court of Appeals for the Seventh Circuit which Court reversed said judgment on June 28, 1945 and on July 13, 1945 denied a petition for rehearing filed by petitioner.

SUMMARY STATEMENT OF MATTER INVOLVED.

Your petitioner further shows that while resisting an arrest being made by officers of St. Clair County, Illinois, on June 14, 1927, he was shot in the right arm and that subsequently his arm was amputated as a result of such wound.

That while petitioner was held in custody under charge of robbery awaiting action of the grand jury of St. Clair County thereon, he was charged to be insane and was taken before the Circuit Court of St. Clair County, a Court of competent jurisdiction, where a jury was impanelled, a trial was had on the issue of petitioner's sanity, and the jury, after hearing the evidence, found a verdict as follows:

> "We the jury impanelled to inquire of and determine whether Alex Mazy is insane at this time, do find and report that said Alex Mazy is now insane and has become insance since the commission of the alleged crime." (Tr. 16.)

That the Circuit Court of St. Clair County then entered judgment that petitioner be committed to the hospital for the criminal insane at Menard, Illinois, until restored, and that petitioner be then returned to the authorities of St. Clair County, for trial of the charge of robbery; (Tr. 16) that thereupon petitioner was delivered to said hospital for the criminal insane and was there held in custody and imprisoned under the authority of said order (Tr. 15-16).

On September 26, 1927, petitioner was indicted by the grand jury of St. Clair County for armed robbery (Tr. 48).

On March 27, 1928, special order No. 3213 was issued by the Director of the Department of Public Welfare stating that "Alex Mazy, a patient in the Chester State Hospital, be discharged in the usual manner and in accordance with the law." (Tr. 52).

Without any hearing upon the sanity of petitioner, he was thereupon returned to the sheriff of St. Clair County where he was arraigned, counsel appointed for him, tried on said charge, and found guilty by a jury of robbery while armed, and sentenced to confinement from 10 years to life imprisonment in one of the State's penitentiaries (Tr. 50).

The only basis for the return of your petitioner to the authorities of St. Clair County is the said order of the Director of the Department of Public Welfare, based upon an expressed opinion of a "Mental Health Officer" (Tr. 52, 69).

No judicial determination was had, prior to petitioner's trial in May 1928, that petitioner had been restored to reason (Tr. 69).

Petitioner, while confined at Statesville in Will County, Illinois, had the validity of his imprisonment tested by

Habeas Corpus in Will County Circuit Court, a competent Court, and the judge of said Court allowed the Petition to be filed, appointed counsel for petitioner, considered the Petition, and denied it about March 1, 1943 (Tr. 11).

At the March term, 1943, of the Supreme Court of Illinois, an application for Habeas Corpus Writ was made by petitioner which was denied on March 18, 1943 (Tr. 12, 13), and again at the May term, 1943, petitioner was allowed to sue for a Writ of Habeas Corpus and it was denied (Tr. 3).

On June 9, 1943 the original petition in this case was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, by leave of Court, on November 9, 1943, and Martin S. Gerber was appointed as counsel for petitioner (Tr. 28, 29).

A motion to dismiss the petition and deny the writ was filed on November 18, 1943, by the Attorney General of the State of Illinois representing the Warden of the Statesville Penitentiary (Tr. 29).

The writ was allowed and issued on December 22, 1943, and returned as served on the Warden on December 28, 1943 (Tr. 39, 40).

On February 11, 1944, the Warden filed his return to the writ (Tr. 40).

THE WARDEN'S RETURN.

The return of the Warden is documented and verified. It states, in substance, that the cause of petitioner's detention is a mittimus authorizing the imprisonment of petitioner for a period of ten years to life by virtue of a conviction for armed robbery.

Upon the question of petitioner's sanity at the time he was tried for said crime, the return sets out that it is,

> "The duty of the Department of Public Welfare, upon the recovery of one who had theretofore been declared insane, to determine whether or not he had recovered from his insanity . . . ;"

and says that,

> "the Department of Public Welfare under the authority vested upon it by the Statute of the State of Illinois, did find petitioner sane and returned him for trial . . . ;"

and further says that petitioner is now sane and was sane when tried (Tr. 46).

The Warden sets out, as Exhibit "C" to his return, the discharge record of the Department of Public Welfare (Tr. 52). From this order of discharge it appears that it was entered upon the report of a Mental Health Officer under whose observation Mazy had been since his admission into the institution, dated March 1, 1928, that,

> "Mazy shows no sign of mental disease and should be returned for trial . . . ;

that the managing officer of the hospital

> "recommends that Mazy be returned to St. Clair County for trial . . . ;"

and that the

> "States Attorney of St. Clair County requests that this action be taken . . . .

therefore the Director of Public Welfare authorized the managing officer of the hospital

> "to discharge Alex Mazy from the institution in accordance with the provisions of the law and return said patient to the sheriff of St. Clair County Illinois" (Tr. 52).

THE ADMITTED FACTS.

The facts were stipulated in detail, the substance of which is that prior to the return of the indictment while held under arrest on a charge of robbery petitioner became insane and in a sanity hearing was found to be so by a jury and on its verdict petitioner was committed to an insane hospital; that petitioner was indicted for said crime while so confined; and that without a furhter trial for his sanity, he was later arraigned under the indictment, counsel appointed, and he was tried, convicted, and sentenced. Petitioner was held under the mittimus of that judgment of conviction from May 1928 until discharged by the District Court.

THE APPLICABLE STATUTE.

Section 593 of the Criminal Code of Illinois, Chapter 38 Revised Statutes, provides as follows:

> "593. Becoming Insane. A person that becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity.
>
> "If after the verdict of guilt, and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue, and if, after judgment and before execution of the sentence, such person becomes lunatic or insane, then in case the punishment be capital the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy.
>
> "In all of these cases, it shall be the duty of the court to impanel the jury to try the question whether the accused be, at the time of impaneling, insane or lunatic."

THE VIEWPOINT OF THE DISTRICT JUDGE.

The controlling facts as stipulated were set out in a written opinion filed in the record by the trial judge, Honorable William J. Campbell (Tr. 69-74). He was of the opinion that a duty was imposed by those facts upon the St. Clair County Circuit Court to determine petitioner's mental condition before his arraignment and trial, and said: "I hold that its failure so to do makes its judgment absolutely void" (Tr. 73).

Judge Campbell said:

> "This court under the law cannot be concerned with the guilt or innocence of the petitioner, nor the nature of the crime for which he stands convicted. It is merely its duty to determine whether or not the State court had jurisdiction to arraign, try, and proceed to judgment in the case of this petitioner. Without the court having such jurisdiction the petitioner is being detained of his liberty on a void judgment. Although the State officials have had knowledge that the petitioner was put on trial before a sanity restoration proceeding took place, they have taken no steps to free the prisoner from the effects of the judgment" (Tr. 73).

With respect to comity between Federal and State governments Judge Campbell said he was not disturbing that relationship,—which required respect by each for the judgments of the other, for the reason that the hearing developed that the judgment was admittedly void because the mandatory provisions of the Illinois Statute were ignored. The court pointed out that, legally speaking, petitioner was never arraigned, tried, or convicted because the mandatory provisions of the statute above quoted were ignored (Tr. 72).

Judge Campbell then said that he was of the opinion that a duty was imposed upon the St. Clair County Circuit Court

> "to determine his (Mazy's) mental condition before his arraignment and trial. I hold that its failure so to do makes its judgment absolutely void . . . ;"

and that without jurisdiction to arraign, try, and adjudge the case,

> "the petitioner is being detained of his liberty on a void judgment . . ."

The Judge then observed:

> "Although the State officials have had knowledge that the petitioner was put on trial before a sanity restoration proceeding took place, they have taken no steps to free the prisoner from the effects of the judgment" (Tr. 73).

The Attorney General of Illinois, standing, and continuing to stand, squarely upon the record as a legal justification for the continued imprisonment of petitioner, regardless of the admitted facts, the court ordered the discharge of petitioner.

The Attorney General of Illinois perfected an appeal on behalf of the Warden to the Circuit Court of Appeals for the Seventh Circuit where upon consideration the judgment of discharge was reversed.

The Attorney General of Illinois contended in the Circuit Court of Appeals that the applicable Illinois Statute

> "expressly authorized the trial of petitioner without further judicial proceedings and vested authority to determine sanity in the State Commissioners of Public Charities or their subordinates."

and further contended that if the District Court were right in its conclusion that the judgment of conviction was void because petitioner was not adjudicated to have been restored to sanity before trial, then petitioner should have been remanded to an appropriate Illinois psychiatric institution; but, if on the other hand, the Circuit Court of St. Clair County were right, petitioner should be remanded to the penitentiary warden.

THE VIEW OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals is based upon certain viewpoints: (1) there was no resort to proceedings in the State courts to obtain release upon the ground on which he was discharged; (2) that the judgment of the District Court is based upon a construction of the Illinois Statute which raises a state or non-federal question rather than a federal one; (3) that the release from the sanity confinement and trial without a new adjudication of sanity was presumably pursuant to the official duty, and presumably pursuant to the duly authorized request of the States Attorney; (4) that the Circuit Court of Appeals could not say that the Illinois statute in question requires a jury trial for restoration to sanity.

It is contended that the judgment of the Circuit Court of Appeals is based upon an erroneous conception of the record and of its legal aspects as well; and that the judgment of the District Court had ultimate justice as its base.

JURISDICTION.

This Court has jurisdiction to review this cause under Section 237B of the Judicial Code as amended, 43 Stat. 927, 28 U.S.C.A. Sec. 344 (b).

The date of the final order of the Circuit Court of Appeals denying petition for rehearing was July 13, 1945; this Court extended the time for filing petition for certiorari to November 1, 1945.

QUESTIONS PRESENTED.

I.

Where the petition, return, and stipulated facts, show the petitioner to have been tried, convicted and sentenced while he was under an adjudication of insanity, and was imprisoned, and continued to be imprisoned under such judgment, and where the Attorney General of the State, knowing the record, insists upon further holding the petitioner as a prisoner under such record, did the District Court err in discharging the prisoner on Writ of Habeas Corpus?

II.

Where the judgment showed no reversible error upon its face, and the writ of error coram nobis is not applicable, and Petition for Habeas Corpus had been applied for in the State courts and denied, and the record before the District Court showed that the defendant when tried was under adjudication of insanity and the Attorney General of the State insisted the judgment was legal and the petitioner then sane, and that he should be remanded to the Warden, was the Court justified in relieving petitioner

from further imprisonment under his Petition for the Writ of Habeas Corpus?

III.

Where the judgment under which a state is imprisoning a petitioner is void, and the state insists upon continuing such imprisonment undersuch void judgment, is the District Court waranted in discharging a prisoner from such imprisonment under his Petition for the Writ of Habeas Corpus.

IV.

Where it is obvious that the State has no other program than to continue the imprisonment of the petitioner under a void judgment, is the District Court warranted in discharging the prisoner from such imprisonment?

V.

Where the admitted facts show that the petitioner is being imprisoned without due process of law, is it necessary to remand a pauper petitioner to the State courts to determine whether the State courts will discharge petitioner?

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The continued imprisonment of petitioner under the judgment of a life sentence imposed upon him while he was under adjudication of insanity is the judicial sanction of life imprisonment of a citizen of the United States without due process of law which should not be permitted to stand unchallenged upon the judicial records of the United States courts.

II.

This case presents an exception to the general rule as to when a petitioner for discharge under Habeas Corpus on a federal ground must exhaust every state remedy available before applying to a federal court for relief and a decision upon the question will be useful to the lawyers and the judiciary.

III.

A decision in this case will further clarify the construction to be put upon the holding of the Supreme Court of Illinois,—that it decides Habeas Corpus cases only upon the certified records presented by the petition, and whether it is necessary to present a case requiring evidnce to any court of Illinois having coordinate jurisdiction with the llinois Supreme Court. Is the remedy automatically exhausted and can application be made direct to the District Court?

IV.

We find no decision by this Court as to whether a District Court would be justified in taking jurisdiction to discharge petitioner from imprisonment in a Habeas Corpus proceeding where the record showed he was being confined under an obviously void order where there was background of fruitless effort to be released from imprisonment.

V.

We do not find any decision which holds that where a District Court finds before it a petitioner held under an admittedly void judgment that it is necessary to remand the prisoner back to the penitentiary so that a state court may be applied to for relief from such void judgment. A decision of this question will be useful to bench and bar.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States of America, ex rel. Alex Mazy* v. *Joseph E. Ragen, Warden,* 149 Fed. 2d 948.

Specification of Errors.

The Circuit Court of Appeals erred in reversing the judgment of the District Court.

Prayer.

Wherefore it is respectfully requested that the Writ of Certiorari be allowed and that the Writ be granted to review the judgment of the Circuit Court of Appeals for the Seventh Circuit.

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ARGUMENT.

Statement.

The petitioner, action pro se, presented an informal petition for Habeas Corpus to the Clerk of the District Court at Chicago and was allowed to file it and to prosecute as a poor person (Tr. 2, 9). Counsel was appointed for petitioner and the Attorney General of Illinois, on behalf of the Warden, appeared, and moved to dismiss the petition.

From papers attached to the petition it appeared that, while held in custody awaiting action of the grand jury, petitioner was charged to be insane; and pursuant to the Criminal Code provision of Illinois law, a jury was impanelled by the Circuit Court of St. Clair County, Illinois, a competent Court, petitioner was tried for insanity, found insane, and was committed to the Hospital for the Criminal Insane at Menard, Illinois, until restored, then to be returned to the authorities of St. Clair County, Illinois, for trial of the charge of robbery (Tr. 15-16).

It also appeared that petitioner had been returned from the Insane institution, put to trial, convicted, and sentenced to ten years to life imprisonment in 1928 and was then confined in the penitentiary under that sentence.

From other papers attached to the petition it appeared the petitioner had been feebly groping from one court to another in a pitiable effort to present his case to some court for consideration. He got no constructive cooperation,—only the cold official negative. He was just another forgotten man crying from the depths of the dungeon. He

had written to the Attorney General of Illinois in December 1942 and sent a Petition for Mandamus, (the contents of which we do not know) and which the Attorney General returned with the advice that the Clerk of the Supreme Court, on conference, had refused to file his petition and telling petitioner that he should move for leave to file it in the Supreme Court accompanied by a petition for leave to sue as a poor person (Tr. 14).

Petitioner, on January 15, 1943 asked leave to file a Mandamus petition in the Supreme Court of Illinois and sue as a poor person and his motion was denied without comment (Tr. 15).

On March 1, 1943, petitioner applied to the Circuit Court of Will County, the county in which petitioner was confined, for leave to file a Petition for Habeas Corpus; it was allowed to be filed, counsel for petitioner appointed, the Petition considered, and then denied because, on the face, it did not show occasion for issuance of the writ (Tr. 11).

On March 18, 1943, petitioner asked leave to file a Petition for Habeas Corpus, and sue as a poor person, in the Ilinois Supreme Court, and was denied with the comment that the petition presented did not give sufficient of the record upon which to base a judgment of Habeas Corpus, and that an action in Habeas Corpus could not be used as a substitute for a writ of error to review errors (Tr. 12, 13).

On May 13, 1943, petitioner filed another petition in the Supreme Court of Illinois for leave to sue as a poor person and for Writ of Habeas Corpus. The motion for leave to sue as a poor person was alowed and the Wrilt of Habeas Corpus denied (Tr. 3).

On June 9, 1943, petitioner presented his petition to the District Court of the United States at Chicago and was given leave to file it as a poor person (Tr. 2, 9).

The content of the petitions filed in other courts does not appear in the record. However, it did appear by the petition, that petitioner had been judicially declared insane before trial but showed no restoration proceeding. An alert judge obviously caught the significance of that fact and ordered the writ to issue as to give petitioner such constructive aid as the record might justify.

When the record was brought before the District Court it appeared that petitioner had been adjudicated insane and that there was neither jury trial, nor bench trial, had upon the question of petitioner's sanity before he was arraigned and required to plead, but that petitioner had been returned from the insane institution to the authorities of St. Clair County upon the observation and statement of a "Mental Health Officer" who said that he was "of the opinion that Mazy now shows no sign of mental disease and should be returned for trial" (Tr. 52).

The observations of that person would have been competent testimony before the Circuit Court had petitioner been tried for sanity before his arraignment for trial; but there was no trial of that issue.

A hearing was had in the District Court on the return of the Warden to the Writ of Habeas Corpus, and a stipulation of facts made (Tr. 69). This stipulation was to the effect that petitioner was adjudicated to be insane in September 1927 by the St. Clair County Circuit Court and without any judicial trial or judgment of restoration to sanity he was arraigned, and tried by the said Circuit Court, convicted, and sentenced to the Penitentiary for the crime

charged, and was then before the District Court in May 1944, under *mittimus* pursuant to that judgment.

The Attorney General of Illinois insisted that petitioner should be remanded to the penitentiary to continue service of the said sentence.

The Court discharged the prisoner.

The Attorney-General appealed to the Circuit Court of Appeals for the Seventh Circuit. The Court reversed the decision of the District Court.

The petitioner now prays for certiorari to review the decision of the Circuit Court of Appeals.

I.

IT IS A VIOLATION OF THE DUE PROCESS OF LAW PROVISION OF THE FEDERAL CONSTITUTION TO TRY, CONVICT, SENTENCE, AND IMPRISON AN INSANE PERSON, AND THE FEDERAL COURTS SHOULD DISCHARGE A PRISONER INSTANTER UPON SUCH A RECORD. HE SHOULD NOT BE FURTHER IMPRISONED TO RUN THE GAMUT OF THE STATE COURTS TO FINALLY GET TO THIS COURT ON CERTIORARI.

The Circuit Court of Appeals reversed this case because it considered that no federal question was presented and says that the decision of the District Judge was based on his own construction of the Illinois Statute.

On the contrary, the District Judge placed his reliance upon the construction which the Supreme Court of Illinois voiced in *People* v. *Preston,* 345 Ill. 11, where it was held that in cases under that statute, the discretion vested in

the trial judge as to procedure was withdrawn by the Illinois Statute and that the procedure must be a jury trial of the insanity issue (p. 16).

It is not being stressed here that petitioner did not get a *jury* trial of the issue of restoration to sanity, but the emphasis is on the fact that petitioner *got no trial,* by judge or jury, upon that issue; for the record shows that prior to trial the petitioner was adjudicated to be insane, and that without further judicial inquiry, petitioner was required to plead, was put to trial, convicted, sentenced, and imprisoned for life.

The Circuit Court of Appeals visions a State question only and says that it cannot say that the admitted facts so far transgress the requirements of due process as to raise a federal question; and further the opinion says that it cannot agree that the Illinois Statute requires a *jury* trial for restoration of sanity and that it was for the State courts to say whether the procedure followed was so defective as to deprive the Court of jurisdiction to render a valid judgment, and cites several cases in support of the point made.

But the cases relied upon by the Circuit Court of Appeals for its conclusions do not apply here. *Nobles* v. *Georgia,* 168 U. S. 398 was only a case of entering an order fixing a date under a mandate to resentence the defendant. *Simon* v. *Craft,* 182 U. S. 427 was an ejectment suit where the title to property was involved with an insanity proceeding of a prior owner. The procedure of adjdication was held valid under Alabama law and decisions. In re: *Moynihan,* 62 SW (2d) 410 (Mo.) was a habeas corpus to relieve the imprisonment where it was claimed the *judge* tried the issue instead of a jury, with no contention that the woman was sane. In re: *Blewitt,* 138 N. Y.

148, it was held that the judge had the discretion to say if the trial of sanity should be by *jury* or *judge*. In *Metaxos* v. *People*, 76 Colo. 264 the superintendent of an insane institution issued a probationary discharge and the county judge put him back without a new trial of the sanity issue.

In *Ferguson* v. *Ferguson*, 128 SW (Tex. Civ. App.) 632 no jury was asked and the *judge* tried the issue of sanity. In *State* v. *Rose*, 195 SW (Mo.) 1013, the defendant was adjudged insane and was caught feigning insanity and the hospital officials turned him back. It was held that there was no occasion to retry his sanity. In *People* v. *Rice*, 256 Pac. (Cal.) 450 the defendant was adjudicated insane and was ordered by some one to be returned from the asylum to the court for trial. To the objection that there had been no trial of restoration to sanity it was said that the defendant never raised the point below. The same idea is found in some of the other cases as if an insane defendant could raise a point of law or as if it were the duty of a lawyer trying the case to decide the point and make the objection.

The same idea is stated here by the Circuit Court of Appeals and it is said in its opinion that in his trial petitoner

> "was represented by counsel who raised no question as to the sufficiency of the administrative finding of sanity and discharge."

But here there was nothing even rising to the dignity of an administrative finding of sanity,—only the report of an observer; and on that report, and the request of the States Attorney of St. Clair County, the managing officer of the Chester State Hospital was authorized to discharge petitioner from that institution and return petitioner to the custody of the sheriff of St. Clair County. It was a com-

pliance with a request and not an administrative finding (Tr. 52). Such an arrangement could not set aside or disturb a judgment of the judicial department of the State of Illinois. Even the Governor of Illinois cannot change the character of a judicial sentence in an effort to commute it (*People* v. *Jenkins*, 322 Ill. 33).

The fact is, there is no ambiguity about the Statute here in question. It says in the most simple and direct language:

> "A person that becomes lunatic or insane after the commission of a crime or misdemeanor *shall not be tried for the offense during the continuance* of the lunacy or insanity." (Italics ours.)

The petitioner here was so tried.

The question is, naturally, when does insanity end?

The statute protects the insane during three periods: (1) becoming insane after the commission of an offense; (2) insanity after verdict and before judgment; (3) after judgment and before execution of sentence; and provides that in all three cases a jury shall be summoned and the question tried,

> "Whether the accused be at the time of impanelling insane or lunatic" (Tr. 71).

When petitioner became insane he lost his civil rights of independent action, to contract, to associations with others. A conservator must act for him. That is no ordinary judgment. It is binding on all. Private persons could not vacate it or destroy its effectivenes; only another judgment of equal dignity could restore citizenship rights and undo the legal effect of the judgment suspending those rights.

A distinction is to be noted between a *judgment restoring* an insane person *to reason*, and an *administrative order re-*

leasing from custody, a person who is under such an adjudication.

How persons shall be treated for the disease of insanity is a legislative question; such persons may be left with their families, or be given the run of an institution, or put behind bars, or even in a strait-jacket. They may be released to friends, or sent home. It all depends upon the law as enacted and circumstances. But all of the time the judgment of insanity is there and it is there until it is satisfied by an order of equal dignity; or, as is required in *criminal cases* in Illinois, until a jury says in a verdict that reason is restored and judgment is entered upon such verdict.

It is true administrative officers permit those restored, and partially restored, to be in the custody of their families and friends and to go out of the confining walls of the asylum. The Statutes permit this to be done. But that is not a *restoration* to civil rights and an adjudication of the fact that the person had been restored to reason.

Here the Circuit Court of Appeals says concerning petitioner's return to the prosecuting authorities of St. Clair County that it was *presumably* done pursuant to the routine of that service. But even so the routine of that service has no broader objective than confinement of an insane person for treatment. It has no judicial powers.

Nothing is said in the statute about an administrative officer reporting to the Court that it has the green light to try, sentence to life imprisonment, or lift the stay orders on execution in a capital case. What is said is:

> "In all of these cases, it shall be the duty of the court to impanel the jury to try the question whether the accused be, at the time of the impanelling, insane or lunatic."

We point out that it is just as imperative to try one for sanity who stands *adjudged* to be insane, as to try one for insanity who stands *accused* of being insane. What is wanted to be known is whether the person before the bar of justice is sane, so he may be tried or sentenced.

In a capital case it is easy to appreciate that the Court would not allow an accused who had been found by a jury to have become insane after judgment of death, be put to death upon the say-so of an observer that the condemned man had become restored to sanity. It is unthinkable. A jury would naturally be impanelled by any judge to try the tragic question. There is no difference in that instance from this case, except in degree, for the statute says "In all these cases," the question of sanity shall be tried.

The Supreme Court of Illinois Has Given a Settled Construction to the Statute.

We suggest that the Supreme Court of Illinois has definitely settled the questions here involved by its opinion in *People* v. *Scott*, 326 Ill. 327, and its later opinion of *People* v. *Preston*, 345 Ill. 11. In the *Scott* case he was convicted of murder and sentenced to be hanged. A petition was presented stating that Scott had become insane, a jury was impanelled to try the question, it found Scott to be then insane, and he was committed to Chester Asylum for insane until restored to reason, then to be returned to have the date of death fixed. A year later the officials of Chester Asylum reported that Scott had recovered his sanity. The States Attorney of Cook County on an unverified petition for writ of Habeas Corpus *ad subjiciendum* and pursuant thereto Scott was produced before the Court and ordered into the custody of the sheriff. After a heated controversy over procedural questions a jury found Scott

to be sane and he was resentenced to be hanged. On writ of error one of the questions was a construction of the statute here in question, as to whether the defendant was entitled to a jury trial upon the question of his restoration to sanity, in view of the fact that the statute is silent as to a trial upon the question of restoration to sanity after a defendant shall have been found to be insane.

The Court there said that a judgment upon a verdict of insanity is not conclusive evidence of his insanity at any other day or date,

> "but the judgment affords a presumption in favor of the defendant that he continued thereafter to be lunatic or insane until the contrary is legally established" (p. 338).

The Court further said that

> "We think from the various provisions of the statute that it should be interpreted as implying that the question whether or not the defendant has recovered from his insanity or lunacy should be passed on by a jury impanelled for the purpose, as was done in this case."

That was said in a capital case, but it as well applies to a life sentence. The degree of punishment does not change the principle involved.

The Court there remarked that the civil statute on lunatics (Chap. 86) had no application to criminal cases and that that statute so provided.

The Court there also said that good practice and sound reason demand that a verified petition should be filed showing a real foundation for the retrial of the defendant's sanity,

> "as the former judgment and finding that the defendant was insane carried with it the presumption that

> he continues to be insane until the contrary is legally established" (p. 340).

It was not therefore the interpretation by Judge Campbell of the Criminal Code of Ilinois that he was applying to the case but the very interpretation which the Supreme Court of Illinois had placed upon and which Judge Campbell was entitled to apply to the case as the fixed and definite law of the State. Judge Campbell quoted from the later case of *People* v. *Preston,* 345 Ill. 11, 16 that the discretion as to procedure had been withdrawn by the statute and a jury trial on restoration was mandatory.

The Circuit Court of Appeals admits that

> "an insane person cannot plead nor can he be sentenced. Violation of that rule would, without doubt, raise the federal question of violation of the due process requirements of our federal Constitution."

We respectfully suggest that that admission should have caused a different result in the Circuit Court of Appeals for the statement of law fits the facts of this case exactly; for here petitioner had been adjudicated to be insane, he was not tried again as to whether he had regained sanity, and he was required to plead while insane, and while insane was sentenced to life imprisonment.

The legal situation indicates a review here.

II.

THE PETITIONER EXHAUSTED HIS REMEDIES IN STATE COURTS AND THE DISTRICT COURT VIOLATED NO RULE AS TO COMITY IN DISCHARGING HIM.

There is grave doubt whether a Habeas Corpus Petition in perfect form would be availing in the courts of Illinois to furnish relief against the judgment here in question. The Habeas Corpus Statute, Chap 65 Illinois Revised Statutes provides in Section 22 the several causes for which a prisoner may be released. The first cause is:

> "1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person."

The other six paragraphs cover specific situations, none of which fit this case.

The Supreme Court of Illinois has construed paragraph 1 above quoted, to give relief only where there is no jurisdiction of subject matter or parties or no power to render the particular judgment (*People, ex rel,* v. *Hunter,* 369 Ill. 425; *People, ex rel.* v. *Fisher,* 372 Ill. 146). No question of fact is to be raised in the Supreme Court of Illinois which has original jurisdiction under the Constitution.

The Supreme Court of Illinois though vested by the Illinois Constitution with "original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases" (Article VI), has lately decided in *People ex rel. Swolley* v. *Ragen,* 390 Ill. 106, that it does not try questions of fact and that "any petition which raises questions of fact only will not be considered."

That ruling of the Illinois Supreme Court made necessary a change by this Court of the required procedural background to habeas corpus cases brought in District Courts where the release of State prisoners is sought on Constitutional grounds.

In *White* v. *Ragen*, 324 U.S. 760, 767, this Court construed that announcement to mean that the Illinois Supreme Court would not thereafter "entertain original applications for habeas corpus, save on a record which excludes on its face the possibility of any trial in that Court of an issue of fact." This Court there said that in such cases where the case had not obviously been decided on a federal ground, it was not necessary to apply to this Court for certiorari, and that such action by the Supreme Court of Illinois would excuse further action on that remedy.

While it is not clear from this record what was in the two habeas corpus petitions presented by petitioner to the Supreme Court of Ilinois, it could well be assumed, being the act of a layman, that it was the same petition in substance that was here presented.

Had the facts of this case been laid before the Supreme Court of Illinois, as they now exist in this record, that Court could have said, and would, no doubt, have said that the petition raised question *de hors* the record of petitioner's conviction, that called for a decision of fact, and would have denied the petition or would have dismissed it upon that theory.

If that inference be justifiable, why should the District Court stand upon ceremony and say that the Supreme Court of Illinois had not been applied to for relief on the admitted state of facts.

Why should it be necessary to apply to any court of Illinois for relief by habeas corpus when its Supreme Court, a Court of coordinate jurisdiction with the Circuit, Superior, and Criminal Courts, takes the position that it will not try questions of fact.

We believe this record presents an exception to the general rule and that this Court should take it and relax the rigid formality that requires a-round-the-clock pursuit of remedies, when the federal question sought for decision cries aloud its presence upon the record.

We suggest that the remedy by habeas corpus has here been exhausted by this layman petitioner's three efforts in the Supreme Court of Illinois, one effort in the Circuit Court of Will County, plus the open contention of the Attorney General that, regardless of the admitted fact of the trial of petitioner while under an adjudication of insanity, further imprisonment is the only program which the State, whose dignity he officially represents, has for petitioner's future.

The existence of the admitted facts in open court should call forth the power of the United States to protect its citizen in his Constitutional right, promptly and without the formality of circuitous procedure.

The remedy of error *coram nobis,* (Ch. 110 Se. 72 Ill. Rev. Stat.) is not available here. That remedy may be used only where there exists some matter of fact at the time of the trial not known to the court or the defendant, and which, if known, and presened, would have produced a different judgment. Here the fact that defendant was under adjudication of insanity was known to the judge and prosecuting attorney; they had participated in the original insanity proceeding (Tr. 34, 35, 36). If sane, petitioner knew

it. If under adjudication of insanity, he could not legally know it.

Nor would a motion to expurge the judgment be here available for the reason that once a prisoner commences the service of his sentence the trial court loses all jurisdiction over his person and the subject matter and is powerless to change or modify it (*People ex rel. McKinley,* 371 Ill. 90). The prisoner is then in the charge of the executive department.

The writ of error would not suffice for that remedy corrects only error appearing upon the face of the record of conviction and the matter complained of here is *de hors* the record.

The Court could not remand petitioner to the Warden for the reason his imprisonment was illegal; nor remand to the Menard hospital for the insane, for it held no *mittimus*; nor to the St. Clair County Circuit Court for it held no charge against petitioner. The Attorney-General claimed only the right to further imprison petitioner under the life sentence, and the only answer was a discharge from the custody of the Warden.

So, habeas corpus, being the only remedy available, and the record exhibiting a cause for discharge for lack of due process under the federal Constitution, why should petitioner be formally remanded back to imprisonment to be brought before some State court to see if it might, perchance, discharge petitioner; and, if not, for petitioner to come again to the District Court for discharge. The law does not favor circuity of action; hence, the only indicated procedure was a discharge from custody.

The action of Judge Campbell in striking down the illegal imprisonment was the ultimate justice of the situation.

III.

COMITY DOES NOT RESPECT A VOID JUDGMENT THAT HOLDS A CITIZEN IN A PRISON. THE CONSTITUTIONAL GUARANTY IS THE HIGHEST IN ORDER OF RESPECT. COMITY BEGINS AT HOME.

The Court had before it a citizen of the United States who was being held and imprisoned under void process, and also the highest law enforcing agency of the State of Illinois urging the continuation of that imprisonment The Judge could not believe that the doctrine of comity required him to remand petitioner to life imprisonment upon void process where the highest law enforcing officer of the State stood before him insisting that the imprisonment must continue. Rather, it would seem that the Judge felt that comity, like charity, begins at home, and that the doctrine required that the State of Ilinois should first respect and observe the basic law of the land before it might insist that its judgment before the Court be respected on the ground of comity.

Comity does not go to the absurd length of requiring that one judicial system should respect the void pronouncements of the other. On the contrary, the rule is that a void judgment may be attacked anywhere, any time, under any circumstance, collaterally or directly, in court or out, it matters not; any time before final judgment is entered upon the record.

Comity respects valid judgments, or judgments erroneous only, for they are valid till reversed, but never void judgments.

Because the highest prosecuting official of the State had no other program for petitioner than his continued im-

prisonment under the St. Clair County Circuit Court judgment, and wanted no other order, the Court discharged him.

The validity of that order of discharge is the subject matter here, and the Court should take the case for adjudication here.

IV.

CONCLUSION.

Mazy Was Entitled to Go Free.

As Mazy stood before the United States District Court as a sane person, he could not be remanded into the custody of the officials of the state hospital for the insane,—first, because he was sane; and second, that institution had discharged him and was not asking for him back, and he was not held under their custody; and third, it is unthinkable to remand a sane person to a lunatic asylum.

As the judgment was void, Mazy was held illegally by the warden. His detention papers were void and the warden had no right to Mazy's custody. A relator imprisoned without due process should not be remanded by a federal judge into the custody of the very state official who is violating the relator's Constitutional right to freedom. Comity requires no such useless action.

The State had no charge against Mazy. Its powers to prosecute Mazy under the St. Clair County indictment were exhausted and St. Clair County officials were not asking for Mazy's custody.

Nothing stood between Mazy and freedom except, maybe, some technical objections as to fruitless efforts in State courts to be released, which were as nothing in the presence of justice.

So the District Court having before it one who was admittedly being held in violation of his Federal Constitutional rights, it would have been a useless gesture to remand Mazy into the custody of the State, or any of its officials, on the idle theory that he must file some more Habeas Corpus suits, or writs of error, or Error *Coram Nobis* proceedings so as to exhaust remedies acknowledgedly useless.

The law requires no useless thing to be done.

Wherefore, it is respectfully suggested that in the interest of justice and to vindicate the supremacy of the guaranteed rights to citizens of the United States against encroachments upon their fundamental liberties, the Writ of Certiorari should be granted as prayed.

All of which is respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 574

ALEX MAZY,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden Illinois State Penitentiary, Stateville, Illinois,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 149 Fed. (2) 948.

STATEMENT OF THE CASE.

The warden of the Illinois State Penitentiary (respondent below, appellant here) appealed to the United States Circuit Court of Appeals for the Seventh Circuit from an order of the District Court for the Northern District of Illinois discharging petitioner, Alex Mazy, from respondent's custody. (*Memorandum, Findings, Conclusions and Order,* Tr. 69.) The order appealed from was entered on May 11, 1944. (Tr. 68.) Notice of appeal was filed on June 30, 1944, after the certificate of probable cause was issued. (Tr. 77.) (Tr. 76.)

The Circuit Court of Appeals reversed the decision of the District Court for the reasons set forth in its opinion.

Petitioner Did Not Exhaust Any of His Remedies in the State Courts.

Petitioner made no attempt to assert in any State court, by any type of proceeding whatever, any of the contentions to which the District Court acceded in setting him free.

The Leading Facts.

Although the record in this case was eighty-three pages in length in the Circuit Court of Appeals, the salient facts can be briefly stated. They are not in dispute and almost all of them appear succinctly in the "*Memorandum, Findings of Fact, Conclusions of Law and Order*" of the district judge. (Tr. 69-74.) The facts are not in dispute and respondent accepts the findings of fact.

The petitioner admittedly committed the crime of armed robbery on June 14, 1927, in St. Clair County, Illinois. (Tr. 69.) Because petitioner's counsel may argue that due process requires this court to attend to considerations of "substantial justice" and because petitioner implies that his punishment is "cruel and unusual" within the federal constitutional inhibition against such punishment, we deem it proper to make the following statement concerning the nature of his offense:

Petitioner and an accomplice named Garrett employed one Edward Bien, a taxi driver of Bellwood, to drive them into the country. After they had proceeded a short distance, Garrett pulled a gun and ordered Bien to "stick them up." (Tr. 61.) Bien resisted, and petitioner "slugged" the victim. (Tr. 61.) Petitioner and his accomplice tied the victim securely and threw him from the car. (Tr. 61.)

In opposing petitioner's parole, the victim stated in 1938, eleven years after the crime, that his eyesight has been constantly "impaired to such an extent that I find it rather difficult to see" (Tr. 68) as a result of this merciless beating.

Having thus gravely and permanently injured the cab driver and relieved him of money and a watch, petitioner and his accomplice proceeded to rob another driver, proceeded to Carbondale, and stole another automobile. Reports of these robberies having preceded them, they were apprehended by police officers and in a gunfight petitioner was shot in the right arm, which was later amputated about seven inches below the shoulder. (Tr. 61.)

While petitioner was undergoing incarceration he "attacked an inmate with a knife because he was ridiculed." (Tr.62.)

On September 3, 1927, before petitioner had been arraigned or tried, a petition to inquire into the lunacy and insanity of the petitioner was filed in the Circuit Court of St. Clair County. (Tr. 15.) Counsel having been appointed as guardian *ad litem* for petitioner, the case was tried. The jury found the petitioner to be "insane and that such insanity occurred after the commission of the alleged crime." (Tr. 69.)

A judgment was entered by the court committing petitioner to the Hospital for the Criminally Insane at Menard, Illinois, there to remain "until restored and then to be returned to St. Clair County for trial." (Tr. 69.) In accordance with this judgment, petitioner was confined in the Chester State Hospital.

On September 26, 1927, an indictment was returned in St. Clair County charging him with robbery. (Tr. 69.) On April 23, 1928, petitioner was arraigned and on May 4th of that year, he was convicted by a jury and thereafter sentenced to a term of ten years to life. (Tr. 69.)

No jury was impaneled to determine whether the petitioner's sanity had been restored; there is no record in the Circuit Court of St. Clair County that any jury was impaneled to conduct such a hearing; and the records of the Circuit and County Courts of St. Clair County and the records of the similar courts at Chester, Illinois, "reveal that no adjudication of restoration to sanity of the petitioner was at any time made by any of said courts." (Tr. 70.)

In the argument, we shall show that it is at least fairly arguable the District Court overlooked the fact that **at the time in question,** the applicable statute expressly authorized the trial of petitioner **without** further judicial proceedings and vested authority to determine

sanity in the State Commissioners of Public Charities or their subordinates.

We contend that we are correct in our construction of the applicable Illinois statutes. But we further maintain that even if the question be regarded as a doubtful one, the mere presence of a doubtful question of Illinois statutory law deprives this case of that "clear and demonstrative" character which is requisite to access to the federal courts before exhaustion of state remedies.

This was recognized by the Circuit Court of Appeals which, as a further reason for reversing the judgment of the District Court, held that the instant case involved the construction of the Illinois statute, which construction raised a state or non-federal question rather than a federal one.

But respondent further contends that if it be conceded that petitioner was unlawfully convicted and sentenced because he was an adjudicated lunatic whose sanity had never been legally restored, then under applicable federal statutory provisions and authorities cited in the Argument, he is not entitled to his freedom and appropriate provision should have been made to authorize his return to the appropriate Illinois psychiatric institution.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals was correct for the reason given in the opinion, that petitioner failed to exhaust plain, speedy and adequate remedies in the courts of Illinois.

At the time that the District Court discharged the relator in the instant case and refused to certify probable cause for appeal, this court's decision in *White* v. *Ragen*, 324 U. S. 760, had not been decided. That important opinion was available, however, for the guidance of the Circuit Court of Appeals. In that case, this court held that a state prisoner who claims deprivation of liberty without due process of law must exhaust every reasonably available remedy afforded by the laws of the state, including application to this court for its writ of *certiorari*, before he may (at least under any ordinary circumstances) resort to a United States court.

Petitioner did not even assert the grounds urged here in his original petition; but the District Court permitted him to amend his petition, although no similar claims had ever been made in any state court.

Adequate remedy was available to petitioner under the law of Illinois.

If petitioner is correct in his position that his arraignment, trial, conviction and sentence were all absolutely and utterly void because there was an unreversed and undisturbed adjudication of his lunacy, presumably all that would have been necessary would have been a

motion addressed to the court, which had inadvertently caused these proceedings to be spread of record, for their expunction. It is of course settled beyond peradventure that a **void**, as distinct from a merely erroneous judgment order, may be expunged at any time. This is certainly the law of Illinois.

See *Thayer* v. *Village of Downers Grove*, 369 Ill. 334, for a clear statement of this axiom and a collation of authorities sustaining it.

Petitioner has made no such motion.

Moreover, if such a motion had been made and denied, a writ of error would have speedily corrected the erroneous judgment. In Illinois, as this court is aware from previous briefs and arguments in Illinois *habeas corpus* cases, a writ of error may issue at any time within twenty years after conviction. All that petitioner would have had to do would be to make the fact of his adjudication appear of record in the criminal conviction by a motion to expunge and if the motion should have been denied, sue out a writ of error. He would have been returned to the Illinois State Hospital for the Criminally Insane to await restoration to sanity by legal proceedings, arraignment and trial.

In the recent case of *People* v. *Brown*, 383 Ill. 287, a writ of error issued and judgment was reversed eleven years after conviction.

The Illinois statutory proceeding in the nature of a common law writ of error *coram nobis* was also available. The Illinois statute, which appears at Chapter 110, Par. 196, Ill. Rev. Statutes 1943, is as follows:

> "196. **(Correction of errors of fact in judicial records.)** The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the

> proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

It is true that it is a classical limitation on this proceeding that it lies only where matter does not appear of record but we anticipate no dispute upon the proposition that what is meant by "matter appearing of record" is "matter appearing of record in the case under the court's advisement at the time judgment is entered."

Courts do not take judicial notice, even of their own records, except the record in the proceeding in question.

Petitioner therefore could have made it appear of record in his criminal case that he was insane at the time of conviction and that the judgment was entered inadvertently.

Moreover, petitioner filed no petition for a writ of *habeas corpus* in the county in which he was convicted, nor after he filed such petition in the Supreme Court of Illinois has he ever sought *certiorari* from the Supreme Court of the United States.

The teaching contained in this court's decision in the recent case of *White* v. *Ragen,* 324 U. S. 760, is controlling in this respect. The decision of the Illinois Supreme Court was a decision by the highest court of the state. The petitioner in order to exhaust his legal remedies should have applied to the United States Supreme Court for a writ of *certiorari.* The adjudication by the

Illinois Supreme Court necessitated the presentation to this court of the federal question involved on *certiorari* or appeal from the state court decision. The availability of any remedy in the District Court thereupon turns upon such prior application to this court. It does appear that the grounds that he urged in support of either petition were not the same grounds that he urges here, since his principal argument in the trial court was that he was arbitrarily denied a pardon, a contention which the trial court decided adversely to him.

II.

Perusal of the Statutes applicable at the time indicate petitioner was properly subject to trial if he was found sane by administrative action without trial by jury. However, at best, construction of the Illinois statute raises a state or non-federal question rather than a federal one and is properly left to the determination of the state courts.

The Attorney General, in his desire to be fair to the petitioner, to his counsel and to this court, argues the considerations developed under this point in the belief, but not in absolute certainty, that they represent a correct and proper construction of certain applicable Illinois statutes. Although we believe, without being completely confident, that we are correct in these contentions, we advance them because, even if the question be deemed doubtful, or even if the court should be inclined to disagree with us, substantial uncertainty upon an important question of Illinois statutory law should constrain a federal court to forbear action when an authoritative and definitive adjudication could be elicited by simple and easy proceedings in the Illinois courts.

The following Illinois statutory provisions, which were in force at the time of petitioner's arraignment, trial and conviction are pertinent:

Paragraph 593 of Chapter 38, the Illinois Criminal Code, as it appears in the annotated statutes for the year 1927, the year during which petitioner in the instant case was tried and convicted, is as follows:

> "593. **Becoming insane.** A person that (*sic.*) becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all of these cases, it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of impaneling, insane or lunatic."

It will be observed that this statute, although it provides for a trial by a jury before a prisoner may be declared insane, is silent, at least so far as express provisions go, with respect to right to trial by jury on the issue of restoration to sanity.

But in 1927, there was in force a statute, which has since been amended. Section 22 of the Lunatics Act (Ill. Rev. Stats., 1927, Chap. 85, par. 22), which is quite long, provides in substance that authority to discharge patients from state institutions for the insane may be discharged by administrative action. No provision is made for trial in any court, either by jury or otherwise. The concluding text of this section is as follows:

> "* * * And no patient who has not recovered his reason or who is charged with crime shall be declared discharged until at least ten days after notice shall have been given to the judge of the county court having jurisdiction in the case, in order to enable the said judge to make some proper order as to the disposition of the said patient, when so discharged, which order shall be entered of record, and a copy thereof furnished to the superintendent, and to the State Commissioners of Public Charities."

The Attorney General is of the view that a proper construction of the provision of the Criminal Code quoted, *ante,* and the statutory provision quoted immediately above, when it is realized that in 1927, there was no provision for a trial by jury on an issue of *restoration* although there was clear and explicit provision for trial by a jury upon the issue of insanity supervening after the commission of crime and before trial, is that a person charged with crime and found to have become insane after the commission of the crime was properly subject to trial if he was found sane by administrative action, without trial by a jury.

If we are correct in this contention, then petitioner was lawfully convicted.

The cases of *People* v. *Scott,* 326 Ill. 327, and *People* v. *Preston,* 345 Ill. 11, relied on by petitioner to sustain his contention that the Illinois Supreme Court has given a settled construction to the statute afford him little comfort.

The determination that the prisoner was "restored to reason" was not before the court in the *Preston* case. The only issue presented and decided in that case was that the verdict returned by a jury in an insanity proceeding was subject to the inherent power of the court to set aside such verdict and order a new trial. It is true

that the court there said that the statute (Ill. Criminal Code, Ch. 38, par. 593, 1927, cited above) made the impaneling of a jury mandatory, but as indicated above, it is pertinent to note that the decision there is silent as to proceedings on the issue of *restoration* of sanity.

To be noted also is that both the *Preston* and *Scott* cases involved crimes which invoked capital punishment. The court in the *Scott* case expressly recognized and indicated the extent of its consideration by the following language found at page 337:

> "• • • The statute also provides for such a trial for a defendant after judgment and before execution, **in case the punishment be capital.** It is only the provision for the third trial that is material for consideration in this case, as the punishment fixed for the defendant was death by hanging. • • •"
> *(Emphasis Supplied.)*

Nowhere in that case can counsel for respondent find that one of the questions before the court was a construction of the statute as to whether the defendant was *entitled* to a jury trial upon the question of his restoration to sanity, as alleged by petitioner. (*Pet. Br.*, p. 23.) The defendant had had two trials below, one to determine his sanity, the second to determine restoration of reason. No question was before the court calling for a decision as to whether defendant was *entitled* to a trial by jury in the second instance. It is submitted here that the language of the court in the *Scott* case does no more than merely approve the procedure followed.

But the most that can be said upon the point in favor of the petitioner is that the question is a doubtful one of Illinois statutory law. It is of course well settled that federal courts will not take jurisdiction, particularly in cases involving *habeas corpus*, injunction or other extraordinary remedy, or, if they take jurisdiction,

will forbear the exercise thereof when the question is one of state statutory law and an authoritative adjudication can be elicited in the state courts.

If we are correct in our construction of this law, petitioner was properly remanded to the Illinois State Penitentiary. But if we are incorrect in our contention, and if it is further assumed that the Circuit Court of Appeals should have decided the question in favor of the petitioner instead of regarding it as doubtful and remanding him to the Illinois State Penitentiary, then clearly, as we shall show under Point III, *post,* petitioner is an adjudicated lunatic who has never been restored to legal sanity and the Circuit Court of Appeals instead of remanding such an adjudicated lunatic to the State Penitentiary, should have remanded him to the Illinois psychiatric custody.

III.

If the District Court had jurisdiction and if petitioner was imprisoned in the penitentiary under a void sentence, then the District Court, instead of discharging the prisoner, or the Circuit Court of Appeals, instead of remanding the prisoner to the Illinois State Penitentiary, should have returned him to confinement in the Illinois psychiatric hospital.

If it be assumed, for the sake of argument, that the District Court properly entertained the instant petition notwithstanding the failure of petitioner to exhaust his remedy in the Illinois courts and if it further be assumed that the prisoner was illegally convicted because he had not been restored to sanity, then it is clear, both under the federal statute immediately hereafter cited

and the authorities hereafter considered, that it was the duty of the court, instead of setting an adjudicated lunatic whose adjudication of lunacy had never been reversed at liberty, to give effect to the unreversed adjudication of lunacy and to restore him to the custody of the Illinois psychiatric authorities.

The significance lies in the question, not in the answer; for it makes no difference how the question is answered. If Mazy was not legally restored to reason, then he should have been remanded to the custody of the psychopathic institution from which he has been freed. But if he was sane and if, as petitioner contends, his trial was a nullity, he is now sane and if the District Court had jurisdiction to determine that fact, then by petitioner's own logic he is a person restored to reason who has never been lawfully tried upon an offense for which he has been indicted. He should therefore be remanded to the county in which he was indicted for trial.

Petitioner was indicted. Before he was convicted he was found to have become insane "after the commission of the crime." Thereafter he was pronounced sane by administrative action but was not restored to sanity by judicial proceedings. One, and only one, of the following alternatives is possible:

Either Mazy is still an adjudicated lunatic, in which case he should have been remanded to the appropriate Illinois psychopathic institution.

Or the administrative action was sufficient to restore him to sanity, in which case he was properly tried and convicted and should be remanded to the penitentiary.

Or the District Court had jurisdiction to determine that he is now sane, in which case he should be remanded to St. Clair County for trial.

Under no conceivable theory was petitioner entitled to his freedom.

He belongs either (a) in the Illinois Institution for the Criminally Insane as an unrestored lunatic; or (b) in the penitentiary as a person once insane but lawfully restored to sanity by administrative action and thereafter convicted and sentenced; or (c) in the county jail of St. Clair County, awaiting trial as a person lawfully adjudged insane but now found sane by a judgment of the District Court.

An important provision of United States *habeas corpus* legislation (Act of Feb. 5, 1867, Chap. 28, Sec. 1, 14 Stats. 385, as amended) is to be found in Title 28, U. S. C. A. as Section 461:

> "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, **and thereupon to dispose of the party as law and justice require.**"

This section has frequently been held to permit and require the district judge, where a petitioner is wrongfully in the custody of A, but belongs, not at large, but in the custody of B, to make orders appropriate to accomplish transfer of custody. In *Tod* v. *Waldman,* 266 U. S. 113, certain immigrants deemed by the immigration authorities to be ineligible to admittance into the United States were being held upon a judgment of deportation to the Secretary of Labor. The Circuit Court of Appeals and the Supreme Court of the United States were of the opinion that the proceedings culminating in the judgment of deportation were so defective as to be invalid and not to authorize deportation, but nevertheless held that the petitioners should be detained on other

process to await full, fair and proper inquiry into their eligibility for admittance.

This case is similar to the instant case in all material respects here. In both the cited case and the instant case, the petitioners were held on proceedings which were claimed to be defective. If it be assumed that in the instant case, as in the cited case, these proceedings were in fact defective and void, then in both cases the situation presented was one where the prisoner was detained upon unlawful process but was subject to detention upon different and lawful process.

In the cited case, the Supreme Court of the United States affirmed the decision of the Circuit Court of Appeals which contemplated, not that the petitioners should be set at liberty, but that they should be detained upon proper process. The court cited the statute above quoted in this brief.

In the case of *Copeland* v. *Archer,* 50 Fed. (2nd) 836, the Circuit Court of Appeals for the Ninth Circuit, finding the petitioner to be unlawfully held by the warden of the United States Penitentiary at MacNeil's Island in the State of Washington because the sentence of imprisonment was null and void but further finding that he was subject to a proper sentence of imprisonment, made an order appropriate to assure that petitioner would not be released but that he would be subject to the custody of proper authorities for transportation so that a proper sentence could be imposed and proper imprisonment could be accomplished.

In the case cited above, the order took the form of a direction to the warden to give ten days' notice to the proper authorities of the place and hour of his discharge, so that they might properly rearrest him. Had the Dis-

trict Court entered such an order in the instant case, petitioner could have been, as he should have been, returned to Illinois psychiatric confinement.

In *Andrus* v. *McCauley*, 21 Fed. Supp. 70, the District Court for the Eastern District of Washington, Southern Division, finding that a prisoner was detained upon a void sentence which was subject to a proper sentence, entered an order that the petitioner be "remanded to the custody of Kings County, Wash., to be taken before the state Superior Court in Kings County, and a sentence properly imposed."

It is clear beyond all argument that if, as respondent contends (see Point II, *ante*), the administrative action of Illinois authorities was sufficient to subject the petitioner to trial and conviction, he should be restored to the penitentiary but if, on the other hand, as petitioner's counsel will contend, petitioner's adjudication of lunacy was never legally vacated, then petitioner belongs in the Illinois psychiatric institution for the criminally insane. Upon no hypothesis consistent with the facts found by the trial court can the petitioner be deemed an adjudicated lunatic so that he could not validly have been convicted, and at the same time be deemed sane so that he is entitled to his absolute freedom.

It is therefore evident that this was certainly not one of the rare extraordinary ones of which the federal courts should, because of a palpable violation of the accused' rights, take jurisdiction when recourse to the state courts was not exhausted.

Petitioner's counsel is forced to the extremity of another dilemma. If we assume that administrative action was not sufficient legally to restore petitioner to sanity, then was or was not the fact that he had not been judi-

cially restored matter of record and knowledge upon petitioner's trial and conviction? If it was not matter of record in that case, it was not matter of fact judicially known to the court and *coram nobis* was appropriate. But if it was matter of record, then a writ of error was appropriate.

Conclusion.

It is earnestly submitted for the reasons urged in this brief that the judgment appealed from should be affirmed or, in the alternative, that a proper judgment should be entered by this court.

Respectfully submitted,

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